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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 780

THE CHRONICLE & GAZETTE PUBLISHING CO., INC.,

Appellant,

vs.

ATTORNEY GENERAL, ET AL.

Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

SUPPLEMENTAL STATEMENT OF JURISDICTION IN REPLY TO THE APPELLEE'S STATEMENT OPPOSING JURISDICTION.

I. A Substantial Federal Question Was Raised by the Appellant's Original Petition

A. *The federal questions sought to be reviewed here were specifically raised in the appellant's original petition.*

The present controversy was initiated when the appellant herein filed a petition for a declaratory judgment in the Superior Court of Rockingham County, State of New

Hampshire (Record p. ——). In paragraph 17 of the petition, it was requested that a declaratory judgment be entered decreeing, among other things, that Section 2 of Chapter 185 of the Session Laws of 1945 is unconstitutional because:

"(1) It impairs the Petitioner's right of freedom of contract;

". . . . . .

"(3) It is an abridgment of the right of freedom of the press guaranteed in Article 22 of the Constitution of the State of New Hampshire and violates the Constitution of the United States;

"(4) It is regulatory and discriminatory and thus violative of the equal protection of the laws guaranteed in Article 10 of the Constitution of the State of New Hampshire and Constitution of the United States;

". . . . . .

"(7) That said section wholly supplants the right of private contract relating to the rates to be charged for political advertisements;

"(8) That a consideration of the public health, safety, morals or general welfare does not authorize the Legislature, under the guise of exercising the police power, to deprive parties of the right to voluntarily contract concerning such ordinary and everyday affairs of life as the printing of political advertisements;

"(9) That said Chapter 185 deprives the Petitioner of its property without due process of law;

"(10) That the Petitioner as the owner and publisher of a newspaper is not in the same classification or category as a public utility and is therefore not subject to governmental control and supervision as to the reasonableness of its advertising rates;

"(11) That the statute is unreasonably regulatory and discriminatory in that it attempts to impose re-

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strictions on publishers of newspapers or other periodicals or operators of radio stations, and does not regulate or attempt to regulate various and numerous other forms and methods of political advertising, thus creating a privilege for such other advertisers and penalizing publishers of newspapers and radio stations.

"(12) That it is an unwarranted, unjustifiable, illegal and unconstitutional attempt to limit the circulation of information to which the public is entitled."

It is obvious that the petition specifically raised questions under both the United States Constitution and that of the State of New Hampshire. For example, it is made clear by sub-paragraph (3) of paragraph 17 that it was claimed that freedom of the press guaranteed by the Federal constitution was abridged. Similarly sub-paragraph 4 invoked the Federal constitution as well as the State constitution It is true that several of the sub-paragraphs did not specifically state that the constitution of both the State and the United States were violated. However, neither are these sections expressly limited so as to specifically invoke only the State's constitution. Read as a whole, in view of those paragraphs which specifically invoke the guarantees in the U. S. Constitution, it is clear that the petition for a declaratory judgment raised federal questions.

This is not an example of what the appellee characterizes as a "casual citation" lacking "sufficient specification to raise a federal question," citing cases where it was held that the constitutional objections were not specified. It is not a case like *Maxwell* v. *Newbold,* 18 How. 511, 15 L. Ed. 506 (1855) cited by the appellee. The only Federal question raised in the State court in that case was embodied in an objection that:

"The charge of the court, the verdict of the jury and the judgment below, are each against and in conflict

with the Constitution and laws of the United States, and therefore erroneous."

The Supreme Court obviously held this insufficient because:

> "It alleges that the charge of the court was against, and in conflict with, the Constitution and laws of the United States. But what right did he claim under the Constitution of the United States which was denied him by the state court? Under what clause of the Constitution did he make his claim? And what right did he claim under an Act of Congress. And under what Act, in the wide range of our statutes, did he claim it? The record does not show—nor can this court undertake to determine that the question as to the faith and credit due to the record and judicial proceedings in Ohio, was made or determined in the state court, or that that court ever gave any opinion on the question. For aught that appears in the record, some other clause in the Constitution, or some law of Congress may have been relied on, and the mind of the court never called to the clause of the Constitution now assigned as error in this court."

Certainly no such criticism can be made here. The rights allegedly infringed are specified in the petition for a declaratory judgment, being the freedom of contract, freedom of the press, equal protection of the laws, the freedom to contract, the freedom from being deprived of liberty and property without due process of law.

Similarly the citation of *Messenger* v. *Mason*, 10 Wall. 507, 19 L. Ed. 1028 (1870) is not pertinent since the appellant there merely raised the objection that a statute was unconstitutional and void without specifying the reasons therefore and without even identifying the statute drawn in question. The decision in *Herndon* v. *Georgia*, 295 U. S. 441, 55 S. Ct. 794 (1935), insofar as that decision is based on the insufficiency of the specification of the constitutional objections, is similarly distinguishable.

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B. *The Federal questions raised by the appellant in its petition for a declaratory judgment were recognized and decided by the Supreme Court of New Hampshire.*

As the Supreme Court of New Hampshire stated in its opinion (*The Chronicle & Gazette Publishing Co., Inc.*, v. *Attoreny General, et al.*, 94 N. H. —, 48 A (2) 478, 479):

> "The questions of law raised by the plaintiff's petition were reserved and transferred without ruling by the Court."

The appellant having specified the various Federal questions in its original petition, they were transferred with all other questions of law.

The defendants' brief filed in the State court impliedly recognized that the constitutional questions raised were based on the Federal as well as the State constitution. Nowhere in the brief is it suggested that the argument is limited to questions raised under the State constitution.

The plaintiff's brief in the State court dealt with several questions, including the constitutional ones. The latter were included under Section D, the heading of which was: "Section 2 of Chapter 185, Laws of 1945, is unconstitutional." It is true that in the subsections under Section D, the plaintiff specifically set out certain provisions of the State constitution. This does not alter the fact that it had raised questions under the Federal constitution. If the plaintiff were in a position where it was claiming that the Federal questions were first raised by it in its State court brief, the brief might be ambiguous and inadequate to serve that purpose. The appellant, however, is not in that position. Its position is that the Federal questions were specified and raised in its petition for a declaratory judgment. The ambiguity, if any, in the brief, does not alter that fact.

The Supreme Court of New Hampshire went on to render an opinion which clearly indicated that it was dealing with Federal as well as State constitutional questions. At least the opinion is consistent with that conclusion. The majority opinion does not limit itself to provisions of the State constitution. It cites cases of the United States Supreme Court involving Federal questions.

Again it is true that the mere citation of cases involving Federal questions and the rendering of a decision consistent with a decision based on both Federal and State questions would not be sufficient in itself to show that the appellant has raised Federal questions. However, that is not the appellant's claim. The latter defined the issues, including the Federal ones, in its original petition for a declaratory judgment. They were all transferred to the Supreme Court of New Hampshire. Presumably, therefore, the latter's decision would embrace all the questions. The fact that its opinion is consistent with passing on the Federal questions, although it does not specifically state that Federal constitutional questions are involved and the citation of cases involving Federal questions, when viewed in the light of the fact that Federal questions had been specifically raised previously, indicate that the State Supreme Court was considering the provisions of the Constitution of the United States.

This fact is made quite clear by the dissenting opinion of Chief Justice Marble. In his opinion he not only cited decisions involving the Federal constitution but specifically and decisively indicated that the appellant had raised Federal questions (*Chronicle & Gazette Publishing Co., Inc.*, v. *Attorney General*, — N. H. —, 48 A(2)378, 483):

> "If, however, that legislation bears no substantial relation to a proper legislative purpose or is either arbitrary or discriminatory, it contravenes both the Fifth and the Fourteenth Amendments to the Federal

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Constitution as well as Articles 2 and 12 of our own Bill of Rights."

Though the mentoin of Federal questions is not alone a sufficient raising of Federal questions, it is significant in the light of the other circumstances of this case. It indicates recognition of the fact that the appellant had raised and presented Federal questions to the State court. The fact that this recognition appears in the dissenting opinion does not detract from its efficacy as some evidence of the fact that the Federal questions were considered. Since the majority opinion is consistent with that conclusion, there can be but little doubt that the Federal questions specifically raised in the original petition for a declaratory judgment, and transferred with all the other questions of law to the New Hampshire Supreme Court, were considered and passed on by that Court in its original decision and opinion.

Subsequently, after the appellant's petition for a rehearing was denied, Chief Justice Marble signed a certificate to the effect that by its original petition Federal questions had been raised by the appellant and decided by the Supreme Court of New Hampshire (see Record p. ——). This certificate was not merely that of Chief Justice Marble but a certificate of the Court signed on its behalf by the Chief Justice. By itself, such a certificate might not be conclusive. But it is entitled to great weight and, in view of the other circumstances outlined previously, it is difficult to understand how one can deny that the Federal questions were raised before and decided by the Supreme Court of New Hampshire.

II. The Appellant Also Properly Raised the Federal Question by Filing a Petition for Rehearing

During the September Term, 1946, of the Supreme Court of New Hampshire, the appellant filed a Motion for Re-

hearing with a Brief in support thereof, again attacking the constitutionality of Chapter 185 of the Session Laws of New Hampshire, raising specifically objections based on clauses of the Constitution of the United States (Record p. ——). On September 3, 1946, the State Court denied the motion.

The appellee has cited *Herndon* v. *Georgia,* 295 U. S. 441, 55 S. Ct. 794, 79 L. Ed. 1530 (1935) to the effect that a petition for rehearing is not effective to raise Federal questions for the first time unless the Court actually entertains the question and decides it.

In *Herndon* v. *Georgia* and the cases cited therein the record merely disclosed a filing of the motion for a rehearing and its dismissal without more. In such a situation obviously it does not affirmatively appear that "the court actually entertains the question and decides it." For all the record shows, the denial of the motion might have been based on some local rule of procedure in those cases which prevented the State Court in question considering the federal questions on their merits.

In the instant case, however, there is an affirmative indication that the questions raised by the motion for a rehearing were entertained on their merits and that the motion was denied because the Court decided the issues adversely to the appellant. These facts are expressly and specifically indicated by the certificate of Chief Justice Marble (Record p. ——), which states that the motion for rehearing raised the specific Federal questions now the subject of this appeal, that these questions were considered on their merits and that they were decided adversely to the appellant.

It should be noted that the certificate is not merely that of Chief Justice Marble but that of the Supreme Court of New Hampshire, Chief Justice Marble signing on its behalf.

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It should also be noted that there is nothing in the Record inconsistent with what is affirmed in the certificate.

Therefore, *Herndon* v. *Georgia, supra,* is inapplicable, since it definitely appears in this case that the questions raised by the motion were considered on their merits. It would seem to follow, therefore, that even though the Federal question had not been previously raised by the appellant, they were raised by the motion for a rehearing. Cf. *Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Co.* v. *Bay,* 200 U. S. 179, 50 L. Ed. 428, 26 S. Ct. 208 (1906).

III. Conclusion

In view of the above considerations, as well as those contained in the appellant's Statement of Jurisdiction, it is respectfully submitted that the Federal questions sought to be reviewed were raised by the appellant in the Supreme Court of New Hampshire (a) by its original petition for a declaratory judgment and (b) by its motion for a rehearing.

In view of the additional fact that the Federal questions so raised are substantial ones, for reasons stated in the appellant's Statement of Jurisdiction, it is submitted that the Supreme Court of the United States has jurisdiction to review the decision of the Supreme Court of New Hampshire in the above entitled cause under Section 237 of the Judicial Code, also known as U. S. C. Title 28, Section 344, and that the appellee's motion to dismiss this appeal or to affirm the judgment from which the appeal was taken should be denied.

HUGHES & BURNS,
Counsel for Appellant.